Kaysen Construction Sdn Bhd v Kong Wha Housing Development Sdn Bhd & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–2235 OF 2010
LOW HOP BING, ABU SAMAH AND ALIZATUL KHAIR JJCA
8 AUGUST 2012

Civil Procedure — Estoppel — Locus standi — Issue of lack of locus standi only raised some 12 years after action was filed — Whether defendant estopped from raising issue of lack of locus stand — Whether inequitable to allow second defendant to be unjustly enriched — The Ka Wah Bank Ltd v Low Chung Song & Ors [1998] 6 MLJ 384

Civil Procedure — Locus standi — Locus standi to bring action — Claim for payment on bank guarantee facility — Issue of lack of locus standi only raised some 12 years after action was filed — Whether defendant estopped from raising issue of lack of locus standi

Contract — Agreement — Facility agreement — Breach — Bank guarantee facility — Availability period — Whether guarantor may refuse payment on ground that guarantee has lapsed — Whether guarantor may refuse payment on ground that guarantee has been assigned to a third party — Whether claimant had necessary locus standi to claim for payment under guarantee under its own name — Whether guarantor estopped from raising issue of lack of locus standi

The first defendant was the developer of a housing project ('the project') for the plaintiff. The second defendant was the bank that financed the project. Pursuant to a bank guarantee, the second defendant had guaranteed to pay to the plaintiff the contract sum of RM3,762,077 upon the issuance of the Certificate of Practical Completion ('CPC'). The plaintiff completed the project and the CPC was issued on 8 June 1994 by the first defendant's architect. Upon the issuance of the CPC, the plaintiff called upon the second defendant for payment under the bank guarantee. The second defendant however rejected the plaintiff's demand on the ground that the bank guarantee had lapsed. In the meantime, the plaintiff had entered into financing arrangements with RHB Bank. As a form of security, the plaintiff assigned to RHB Bank all its rights, title, interests, benefits and claims under the bank guarantee via a deed of assignment. The plaintiff filed the present action against the defendants pursuant to the second defendant's refusal to pay on the bank guarantee. The second defendant now claimed that the plaintiff was not

entitled to claim under the bank guarantee or to commence this action against them as the plaintiff had assigned absolutely all its rights under the bank guarantee to RHB Bank. The learned judicial commissioner found that the bank guarantee was valid. However, the learned judicial commissioner upheld the second defendant's contention and dismissed the plaintiff's claim on the ground that the plaintiff lacked the necessary locus standi to bring this suit in its own name by virtue of the said deed of assignment. The plaintiff appealed against that decision contending that the second defendant was estopped from raising the issue of lack of locus standi as the issue of lack of locus standi was only raised by the second defendant in the amended statement of defence some 12 years after the this action was filed.

Held, allowing the plaintiff's appeal:
The second defendant was legally bound to honour its obligations under the bank guarantee to pay the plaintiff the amount claimed. The second defendant was estopped from relying on the said deed of assignment as raised in the amended statement of defence to deny the plaintiff's rightful claim as: (a) its failure to raise the objection to the plaintiff's locus standi to commence and maintain this action timeously had resulted in irretrievable prejudice to the plaintiff and third parties thereby causing injustice; and (b) it would be inequitable to allow the second defendant to be unjustly enriched from so doing referred (see para 27); *The Ka Wah Bank Ltd v Low Chung Song & Ors* [1998] 6 MLJ 384.

[Bahasa Malaysia summary

Defendan pertama adalah pemaju projek perumahan ('projek tersebut') untuk plaintif. Defendan kedua adalah bank yang membiayai projek tersebut. Berikutan jaminan bank, defendan kedua telah menjamin untuk membayar kepada plaintif jumlah kontrak sebanyak RM3,762,077 selepas pengeluaran Sigil Pengelesaian Praktical ('SPP'). Plaintif menyiapkan projek tersebut dan SPP dikeluarkan pada 8 Jun 1994 oleh arkitek defendan pertama. Selepas pengeluaran SPP, plaintif meminta defendan kedua untuk bayaran di bawah jaminan bank. Defendan kedua walau bagaimanapun menolak tuntutan plaintif atas alasan bahawa jaminan bank tersebut telah luput. Sementara itu, plaintif telah memasuki pengaturan pembiayaan dengan Bank RHB. Sebagai bentuk sekuriti, plaintif meletakhakkan kepada Bank RHB kesemua haknya, hak milik, kepentingan, faedah dan tuntutan di bawah jaminan bank melalui surat ikatan penyerahakkan. Plaintif memfailkan tindakan ini terhadap defendan-defendan berikutan penolakan defendan kedua untuk membayar ke atas jaminan bank tersebut. Defendan kedua sekarang menuntut bahawa plaintif tidak berhak untuk menuntut di bawah jaminan bank atau untuk memulakan tindakan ini terhadap mereka memandangkan plaintif telah menyerahakkan secara mutlak kesemua haknya di bawah jaminan bank kepada Bank RHB. Pesuruhjaya kehakiman yang bijakasana mendapati bahawa jaminan bank adalah sah. Walau bagaimanapun, pesuruhjaya kehakiman yang

bijakasana mengesahkan hujahan defendan kedua dan menolak tuntutan plaintif atas alasan bahawa plaintif tidak mempunyai locus standi yang perlu untuk membawa tindakan ini dalam namanya sendiri berikutan surat ikatan penyerahakkan tersebut. Plaintif merayu terhadap keputusan tersebut dengan berhujah bahawa defendan kedua diestop daripada membangkitkan isu tidak mempunyai locus standi memandangkan isu tidak mempunyai locus standi hanya dibangkitkan oleh defendan kedua di dalam penyataan pindaan pembelaan 12 tahun selepas tindakan ini difailkan.

Diputuskan, membenarkan rayuan plaintif:
Defendan kedua terikat dari segi undang-undang untuk memenuhi tanggungjawabnya di bawah jaminan bank tersebut untuk membayar kepada plaintif jumlah yang dituntut. Defendan kedua diestop daripada bergantung ke atas surat ikatan penyerahakkan tersebut seperti yang dibangkitkan di dalam penyataan pindaan pembelaan untuk menafikan tuntutan plaintif yang sah memandangkan: (a) kegagalannya untuk membangkitkan bantahan terhadap locus standi plaintif untuk memulakan dan mengekalkan tindakan ini tepat pada masanya telah mengakibatkan prejudis yang tidak dapat dipulih kepada plaintif dan pihak-pihak ketiga dengan itu menyebabkan ketidakadilan; dan (b) akan menjadi tidak saksama untuk membenarkan defendan kedua menjadi 'unjustly enriched' daripada tindakan sedemikian dirujuk (lihat perenggan 27); *The Ka Wah Bank Ltd v Low Chung Song & Ors* [1998] 6 MLJ 384.]

Notes

For cases on facility agreement, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 2818–2820.

For cases on locus standi in general, see 2(4) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 5542–5630.

Cases referred to

Berjaya Times Square Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd v M Concept Sdn Bhd [2010] 1 MLJ 597; [2010] 1 CLJ 269, FC (refd)

Ka Wah Bank Ltd The v Low Chung Song & Ors [1998] 6 MLJ 384, HC (refd)

Kredin Sdn Bhd v YTF Investments Sdn Bhd [1998] 1 MLJ 46; [1998] 1 CLJ 205, CA (refd)

Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd [1984] 2 MLJ 268; [1985] 1 CLJ 56, FC (refd)

Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor [1996] 1 MLJ 113, FC (refd)

Legislation referred to

Companies Act 1965 s 181

Appeal from: Civil Suit No D2–22–1052 of 1994 (High Court, Kuala Lumpur).

Rajendra Navaratnam (Choo Mun Wei with him) (Azman Davidson & Co) for the appellant.
S Suhendran (K Gobinath with him) (Kadir, Andri & Partners) for the second respondent.

Alizatul Khair JCA (delivering judgment of the court):

[1] This was an appeal against the decision of the learned judicial commissioner (as the learned judge then was) who had, after a full trial, dismissed the appellant/plaintifff's claim against the second respondent/second defendant with costs.

[2] We had allowed the appeal for the reasons set out below. For the purpose of this judgment, the parties will be referred to as in the court below.

BACKGROUND FACTS

[3] The background facts were, in the main, undisputed. The plaintifff, Kaysen Construction Sdn Bhd, was involved principally in the construction of residential and commercial buildings. The first defendant, Kong Wha Housing Development Sdn Bhd, was the developer of the housing project known as Taman Sinaran in Grik, Hulu Perak ('the project').

[4] The second defendant, Malaysian International Merchant Bankers Bhd, was the merchant bank that financed the project.

[5] The circumstances leading to the involvement of the plaintifff in the project are set out in the learned judicial commissioner's judgment and they bear reproduction as, apart from the documentary evidence, these circumstances were relied on by the plaintifff to plead estoppel — 'Lim Voon Ming ('PW1'), a director of the plaintifff, enlightened the court as to how the plaintifff came to be involved with the defendants. The first defendant was the developer of the project which had been abandoned. On 31 March 1993, the plaintifff was invited by Juruukur Bahan Malaysia to tender for the project. Vide a letter of award dated 2 July 1993 (pp 9–12 of AB1), the first defendant awarded the plaintifff the contract for the construction and completion of the said project.

PW1 told the court that the plaintifff was induced to take up the project as the second defendant had given a bank guarantee dated 17 November 1993 (pp 13–15 of AB1) for a sum of RM3,762,077 which was equivalent to the full contract price upon the issuance of a Certificate of Practical Completion ('CPC'). He explained that the second defendant was prepared to make such a

guarantee because the previous contractor had abandoned the project and brought an action against the first defendants to complete the project by claiming the late delivery. The second defendant was eager to complete the project as it had given a loan of RM2.5m to the first defendant to finance the project. Thus, in order for the second defendant to recover the loan that was given to the first defendant, it had to get another contractor to complete the project.

PW1 testified about a meeting that was held on 2 June 1993 which was attended by representatives from Messrs Projalma Ventures Sdn Bhd (the project manager), representatives from the first defendant, the second defendant's legal adviser, the assistant general manager, its representative, the plaintifff's representatives and about 100 purchasers of houses and shops in the project. At this meeting, the second defendant's legal adviser and assistant general manager announced that the plaintifff would complete the project within nine months. The second defendant would guarantee payments to the plaintifff upon issuance of the CPC by the architect. The purchasers would have to waive their legitimate claim for late delivery against the developer and sign a Form of Waiver. All this is reflected in the minutes of the meeting (pp 4–7 of AB1)'.

[6] The plaintifff completed the project and the CPC was issued on 8 June 1994 by the first defendant's architect. Upon the issuance of the CPC, the plaintifff made a demand on the bank guarantee vide letter dated 15 June 1994. Vide letter dated 20 June 1994, the first defendant requested the second defendant to withhold the disbursement of money under the bank guarantee to the plaintifff.

[7] On 28 June 1994, the second defendant replied stating that it would comply with the demand made pursuant to cl B(1) of the bank guarantee as they were not in a position to verify the validity of the CPC.

[8] Subsequently, the second defendant vide letter dated 19 August 1994 changed their position and rejected the plaintifff's demand on the ground that the bank guarantee had lapsed six months from the date of the bank guarantee ie it lapsed on 17 May 1994.

[9] In the meantime, the plaintifff had entered into financing arrangements with Rakyat Merchant Bankers Bhd ('RMBB') (subsequently vested in RHB Bank Bhd) ('RHB Bank') in order to raise finance for the plaintifff to carry out the project. As a form of security, for the loan granted to the plaintifff, RHB Bank requested the plaintifff to assign all its rights, title, interests, benefits and claims under the bank guarantee to RHB Bank. Thus on 6 Disember 1993, the plaintifff entered into a deed of assignment with RHB Bank (the said deed of assignment).

[10] As stated by the learned judicial commissioner in her judgment, the plaintifff had intended to repay the loan to RHB Bank after receiving the money from the second defendant. When the second defendant rejected the plaintifff's demand for payment under the bank guarantee, the plaintifff was unable to settle the loan. RHB Bank subsequently commenced winding up proceedings against the plaintifff and bankruptcy proceedings against PW1 as guarantor.

[11] The plaintifff thereafter filed the present action against the first and second defendants. The first defendant has since been wound up.

THE PLAINTIFFF'S CLAIM

[12] The plaintifff's claim against the second defendant is based essentially on the bank guarantee under which the second defendant had guaranteed to pay to the plaintiff the contract sum of RM3,762,077 upon the issuance of the CPC and which the second defendant had failed to pay.

THE SECOND DEFENDANT'S CONTENTION

[13] The argument put forth by the second defendant in disputing the plaintiff's claim was two fold:

(a) the plaintiff was not entitled to claim under the bank guarantee or to commence and continue this action against them as the plaintiff had assigned absolutely all its rights, title, interest, benefits and claims under the said bank guarantee to RHB Bank; and

(b) the bank guarantee had lapsed or, was no longer valid by the time the plaintiff issued the letter of demand (to the second defendant) on 15 June 1994.

THE HIGH COURT'S FINDINGS

[14] The learned judicial commissioner found as regards issue (b) above that, based on the factual matrix of the case, the validity period of six months in the bank guarantee referred to the date of the issuance of the CPC and not the bank guarantee as contended by the second defendant. Hence the bank guarantee had not lapsed when the plaintiff called on it, on 15 June 1994.

[15] As regards issue (a) above, the learned judicial commissioner upheld the second defendant's contention and dismissed the plaintifff's claim on the

ground that the plaintifff lacked the necessary locus standi to bring this suit in its own name by virtue of the said deed of assignment.

[16] The learned judicial commissioner based her decision on the Federal Court decision of *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* [1984] 2 MLJ 268; [1985] 1 CLJ 56 (*Nouvau Mont Dor*) and the Court of Appeal case of *Kredin Sdn Bhd v YTF Investments Sdn Bhd* [1998] 1 MLJ 46; [1998] 1 CLJ 205 which followed the decision of *Nouvau Mont Dor* and held as follows:

> The court, upon a careful perusal of the deed of assignment of bank guarantee, is satisfied that the plaintiff had given an absolute assignment of all its rights, title and interests under the bank guarantee to RMBB (now RHB). That this assignment is an absolute assignment is clear from the very phraseology itself where clause (2) states emphatically that 'the Assignor HEREBY ASSIGNS absolutely to the Assignee all the Assignor's present and future rights, title and interest under the bank guarantee …'. Based on the authorities of *Nouvan Mont Dor* (sic) and *Kredin Sdn Bhd v YTF Investments Sdn Bhd*, the court is satisfied that the plaintiff, having assigned its rights etc absolutely to RMBB was not entitled to sue in its own name. On the contrary, the action should be brought by the assignee (RMBB) in its own name or else by the assignee in the name of the assignor. Hence the rationale for clause 4(b) of the deed of assignment whereby the assignee covenants with the assignee that:
>
> > … it will do or permit to be done each and every act or thing which the Assignee may from time to time require to be done for the purpose of enforcing the Assignee's rights under the Bank Guarantee and this Assignment and will allow its name to be used as and when required by the assignee for that purpose.

In this regard, the court also rejected the plaintifff's claim that the letter of ratification issued by RHB Bank on 18 January 2007 had the effect of rectifying the plaintifff's lack of locus standi in commencing the action and found instead that RHB Bank's ratification did not have the effect of 'lending legitimacy to the plaintifff's claim'.

THE APPEAL

[17] As the second defendant did not cross-appeal against the learned judicial commissioner's finding on issue (b) the finding of the court on this issue therefore remains. The appeal before us was therefore confined to the learned judicial commissioner's finding on issue (a). As regards the finding of the court on this issue, the primary submission before us revolved around the following issues:

Whether the plaintiff lacked the necessary locus standi due to the said deed of assignment

[18] On this issue, learned counsel argued that *Nouvau Mont Dor* is no

longer good law in view of the recent Federal Court decision of *Berjaya Times Square Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd v M Concept Sdn Bhd* [2010] 1 MLJ 597; [2010] 1 CLJ 269 which held, inter alia, that the principles of construction applied by Seah FCJ in *Nouvau Mont Dor* was not good law and should not be followed.

[19] The learned trial judge in this case was therefore in error in applying those same erroneous principles to conclude that the said deed of assignment was an absolute assignment.

Alternatively, whether the second respondent was estopped from raising the issue of lack of locus standi after 12 years.

[20] As the issue of lack of locus standi was only raised by the respondent in the amended statement of defence by way of amendment, some 12 years after the this action was filed it was the plaintifff's submission that, in the alternative the second defendant was estopped from alleging and/or relying on the said deed of assignment raised in the amended statement of defence to deny the plaintifff the right to claim the said sum of RM3,762,077 under the bank guarantee.

[21] The plaintiff relied on the case of *The Ka Wah Bank Ltd v Low Chung Song & Ors* [1996] 6 MLJ 384 (*Ka Wah Bank*) in support of their argument. In that case, the High Court held that estoppel applied to prevent the defendant from raising the issue of locus standi at that late stage (ten years since the action was filed). Selventhiranathan J (as he then was) propounded as follows:

> In relation to the contention of the defendants that the plaintifff had no locus standi to bring this action, I was of the view that *estoppel applied to prevent them at this late stage from raising this issue when they should have*, if they were indeed serious in their contention, *applied to strike out this action at inception after they were served with process herein*. However, *having recognised the locus standi of the plaintifff to bring this action by submitting to the jurisdiction of this court, and having participated in its proceedings without reservation up to this stage, the defendants cannot now be heard to Question the standing or right of the plaintifff to do so* as the existence of that standing or right was a necessary pre-condition to clothe the plaintifff with the where with all to commence proceedings against the defendants in the first instance.
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> The fact that the very issue of the locus standi or the plaintifff to bring an action in its own name was raised and decided in 1986 by two courts of competent jurisdiction in proceedings in Hong Kong between the plaintifff, on the one hand, and the defendants and other persons, on the other, militates against the defendants being permitted to reagitate the same issue in this court at this late stage and about ten years after this action was filed, particularly when the issue was available to be raised as a defence and known to the defendants when the action was commenced. *If the defendants were allowed to do this now, it would make a mockerv of the law and result in injustice as a plea that any new action brought by the Government of Hong Kong*

is time-barred under the Limitation Act 1953 is bound to be raised by the first and second defendants and, most probably, by the other defendants as well. (Emphasis added.)

[22] The facts of the present case according to the plaintifff were similar to that of *Ka Wah Bank*s' in that:

(a) the second defendant had known all the while, since the inception of action, the relationship between the plaintifff and the principal (ie RHB Bank) in respect of the deed of assignment dated 6 Disember 1993 (see para 13 of the statement of claim, which was not denied by the second defendant);

(b) the second defendant could have raised this issue earlier on. Had this been done, the plaintifff could have amended the pleadings to add the principal as a co-plaintifff. However that option was no longer available to the plaintifff as limitation had long set in;

(c) the second defendant only raised the issue of locus standi in the amended statement of defence some 12 years after the filing of this action, causing detriment and irretrievable prejudice to the plaintiff; and

(d) the second defendant's amended statement of defence had also irretrievably prejudiced RHB Bank's rights under the deed of assignment against the second defendant.

[23] The plaintiff further argued that it would be grossly inequitable for the second defendant to rely on the said deed of assignment to defeat the plaintiff's claim, as it would allow:

(a) the second defendant to be unjustly enriched, by having the benefit of the plaintiff's work without having to pay for it; and

(b) the second defendant to benefit from its own wrong or mistake by failing to object to the plaintiff's locus standi timeously, at the expense of the plaintiff (and possibly others) who have been irretrievably prejudiced.

[24] In support of this proposition, the plaintiff referred to the case of *Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor* [1996] 1 MLJ 113 (*Owen Sim Liang Khui*) where the Federal Court held that a respondent in a petition under s 181 of the Companies Act 1965 would be estopped from asserting the issue of locus standi of the petitioner if he is guilty of unjust or inequitable misconduct. Justice Gopal Sri Ram JCA (as he then was) opined that:

> It may therefore be quite safely stated that if facts emerge from which it may be determined that it is unjust or inequitable to permit a respondent to a petition under s 181 to assert or to contend that a petitioner has no locus standi to move the court, then, he will be estopped from so asserting.

DECISION

[25] Having carefully considered the matter, we were persuaded by the plaintiff's alternative submission on the applicability of the doctrine of estoppel to the present case.

[26] Consequently we were of the view that, having regard to the facts and circumstances of the case as set out in para A above in particular the circumstances leading to the involvement of the plaintiff in the project as seen from the learned judicial commissioner's judgment; the contemporaneous documents (in particular the minutes of the meeting referred to by the learned judicial commissioner at pp 124–127, AR, the letter of award dated 2 July 1993 and the bank guarantee dated 17 November 1993 at pp 129–131 and 133–135 of the AR respectively) and the doctrine of estoppel, as propounded in *Ka Wah Bank*'s (the facts of which are similar to the present case) and *Owen Sim Liang Khui*'s, the second defendant was legally bound to honour its obligations under the bank guarantee to pay the plaintiff the amount claimed.

[27] We also fully agree with the submissions of the plaintiff that based on the aforesaid authorities, the second defendant was estopped from relying on the said deed of assignment as raised in the amended statement of defence to deny the plaintiff's rightful claim as:

(a) its failure to raise the objection to the plaintiff's locus standi to commence and maintain this action timeously has resulted in irretrievable prejudice to the plaintiff and third parties thereby causing injustice; and

(b) it would be inequitable to allow the second defendant to be unjustly enriched from so doing.

[28] We therefore found that the learned judicial commissioner had erred in this regard and allowed the plaintiff's appeal. We accordingly set aside the order of the High Court and substitute it with the order allowing the plaintiff's claim with interest as pleaded.

[29] We also ordered the second defendant to pay costs of RM85,000 here and in the court below to the plaintiff and the deposit to be refunded.

Plaintiff's appeal allowed.

Reported by Kanesh Sundrum